

University of Maryland Law Journal of Race, Religion, Gender and Class

Volume 16 | Issue 1

Article 3

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Recommended Citation

Sanjay K. Chhablani, *Legitimate Justice: Using Clemency to Address Mass Incarceration*, 16 U. Md. L.J. Race Relig. Gender & Class 48 ().
Available at: <http://digitalcommons.law.umaryland.edu/rrgc/vol16/iss1/3>

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LEGITIMATE JUSTICE: USING CLEMENCY TO ADDRESS MASS INCARCERATION

Sanjay K. Chhablani*

Stephanie George, a single mother with three young children, was convicted of conspiracy to distribute cocaine after police found a lockbox containing a half-kilogram of cocaine in her home. The trial judge acknowledged her limited role in the crime, noting that “[e]ven though you have been involved in drugs and drug dealing, your role has basically been as a girlfriend and bag holder and money holder but not actively involved in the drug dealing.”¹ Moreover, that crime, and her two prior convictions for minor drug sales (\$40 and \$120), were non-violent. Nevertheless, contrary to his own sense of the appropriate punishment, the judge was compelled by the federal sentencing guidelines to sentence Stephanie to life imprisonment without the possibility of parole.²

Stephanie’s incarceration occurred during a time when the population of persons incarcerated in state and federal prisons mushroomed. Over a period of three decades, the number of persons incarcerated quadrupled to over two million,³ with the population of federal inmates growing an even more stunning eight-fold during that period.⁴ If persons on parole or probation are also counted, almost 7

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¹ See John Tierney, *For Lesser Crimes, Rethinking Life Behind Bars*, N.Y. Times (Dec. 11, 2012), <http://nyti.ms/UzqpOy>.

² The trial judge, Judge Roger Vinson, said that Stephanie’s conduct “certainly in my judgment . . . does not warrant a life sentence. *Id.*”

³ See E. ANN CARSON & DANIELA GOLINELLI, U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2012: TRENDS IN ADMISSIONS AND RELEASES, 1991–2012 1 (2014), <http://www.bjs.gov/content/pub/pdf/p12tar9112.pdf> (noting “between 1978 and 2009, the number of prisoners held in federal and state facilities in the United States increased almost 430%, from 294,400 on December 31, 1978, to 1,555,600 on December 31, 2009.”).

⁴ See James Cole, Deputy U.S. Att’y Gen., Remarks at the New York State Bar Association Annual Meeting (Jan. 30, 2014), <http://www.justice.gov/opa/speech/remarks-prepared-delivery-deputy-attorney-general-james-cole-new-york-state-bar> (last visited on Aug. 6, 2015) (“[O]ver the

million persons, or 1 out of every 31 adults in the country, are under correctional supervision.⁵

There has been growing recognition that this mass incarceration has come at an unsustainably high cost both in human⁶ and economic⁷ terms. There is also recognition that these high costs may not justify the benefits since the never-ceasing increase in mass incarceration seems to have a diminishing utility in stemming crime.⁸ As an editorial in a leading news publication observed, “[f]or more than a decade, researchers across multiple disciplines have been issuing reports on the widespread societal and economic damage

last thirty years, the federal prison population has increased at a staggering rate of 800 percent—currently totaling nearly 216,000 inmates.”).

⁵ LAUREN E. GLAZE & DANIELLE KAEBLE, U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, CORRECTIONAL POPULATIONS IN THE UNITED STATES 3 (2013), <http://www.bjs.gov/content/pub/pdf/cpus13.pdf>. (last visited on August 6, 2015).

⁶ See CHRISTIAN HENRICHSON & RUTH DELANEY, VERA INST. OF JUSTICE, THE PRICE OF PRISONS: WHAT INCARCERATION COSTS TAXPAYERS 3 (2012), http://www.vera.org/sites/default/files/resources/downloads/Price_of_Prisons_updated_version_072512.pdf. Further,

Incarcerated men and women also bear economic and social costs associated with prison—as do their families and communities. As a 2005 study concluded, “Incarceration impacts the life of a family in several important ways: it strains them financially, disrupts parental bonds, separates spouses, places severe stress on the remaining caregivers, leads to a loss of discipline in the household, and to feelings of shame, stigma, and anger.”

Id.

⁷ *Id.* at 9 (“Among the 40 states surveyed, representing more than 1.2 million inmates (of 1.4 million total people incarcerated in all 50 state prison systems), the total per-inmate cost averaged \$31,286 and ranged from \$14,603 in Kentucky to \$60,076 in New York.”)

⁸ *Id.* at 13 (“A growing body of research suggests—and government officials acknowledge—that beyond a certain point, further increases in incarceration have significantly diminishing returns as a means of making communities safer.”). In fact, since there are limited financial resources, excessive money spent on corrections diverts necessary resources from crime prevention and prosecution, thereby counterintuitively endangering public safety. See Cole, *supra* note 4 (“[T]here is a basic truth that dollars are finite. Every dollar we spend at the Department of Justice on prisons - and last year we spent about \$6.5 billion on prisons - is a dollar we cannot spend supporting our prosecutors and law enforcement agents in their fight against violent crime, drug cartels, public corruption, financial fraud, human trafficking, and child exploitation, just to mention a few. In other words, if we don’t find a solution to the federal prison population problem, public safety is going to suffer.”)

caused by America's now 40-year experiment in locking up vast numbers of its citizens."⁹ "[O]verwhelming evidence shows a crisis that threatens society as a whole . . . [and] those who study the problem have called for immediate correction," the editorial continued.

It is in this context that, on December 19, 2013, almost seventeen years after Stephanie's conviction, President Obama commuted her sentence, along with those of seven other federal inmates who had been convicted of non-violent drug offenses.¹⁰ Then, about a month later, the Department of Justice ("DOJ") announced a new initiative aimed at identifying similarly situated inmates to recommend for clemency consideration.¹¹

In Part I, this paper provides an overview of President Obama's clemency initiative. In Part II, it explores the potential of the clemency initiative to address mass incarceration in the short term, discussing three significant limitations. In Part III, this paper explores the long term efficacy of the clemency initiative, addressing key claims levied by critics challenging the legitimacy of the clemency initiative; in addition, recognizing that critics may be driven by a justifiable angst about unbridled executive power, the paper discusses the restraints that limit the exercise of the President's clemency power.

I. PRESIDENT OBAMA'S CLEMENCY INITIATIVE

On January 30, 2014, Deputy Attorney General James Cole addressed the New York State Bar Association Annual Meeting.¹² After providing an overview of the DOJ's ongoing three-pronged strategy for addressing mass incarceration—crime prevention, alternatives to incarceration, and reentry—he spoke about the potential use of executive clemency powers to also address the problem. He added that "[i]t is the Department's goal to find additional candidates,

⁹ Editorial, *End Mass Incarceration Now*, N.Y. TIMES (May 24, 2014), <http://nyti.ms/1jNhRq2>.

¹⁰ Charlie Savage, *Obama Commutes Sentences for 8 in Crack Cocaine Cases*, N.Y. TIMES (Dec. 19, 2013), <http://www.nytimes.com/2013/12/20/us/obama-commuting-sentences-in-crack-cocaine-cases.html>.

¹¹ Matt Apuzzo, *Justice Dept. Starts Quest for Inmates to Be Freed*, N.Y. TIMES (Jan. 31, 2014), <http://nyti.ms/1fePWc8>.

¹² See Cole, *supra* note 4.

who are similarly situated to the eight granted clemency last year, and recommend them to the President for clemency consideration.”¹³

A few months later, Mr. Cole provided further guidance about the clemency initiative, specifying the criteria that the DOJ would use “when reviewing and expediting clemency applications from federal inmates.”¹⁴ Specifically, under the clemency initiative, the DOJ will prioritize processing clemency applications that meet all of the following criteria: (1) the inmate is currently serving a federal sentence in prison and has served at least 10 years of her/his sentence; (2) the inmate likely would have received a substantially lower sentence if convicted of the same offense(s) under the guidelines in effect today; (3) the inmate is a non-violent, low-level offender without significant ties to large scale criminal organizations, gangs or cartels and without a significant criminal history; and (4) the inmate has demonstrated good conduct in prison and has no history of violence prior to or during the current term of imprisonment.¹⁵

While this clemency initiative is not expressly directed at inmates convicted of drug and weapons offenses, in practice that is the population most likely to be impacted. Of the broadly four categories of crimes for which federal inmates were convicted¹⁶—violent crimes, property crimes, public order offenses and drug offenses—the roughly 13,600 inmates convicted of violent offenses¹⁷ are categorically ineligible for the clemency initiative. While the 11,500 federal inmates convicted of property crimes¹⁸ are not similarly categorically excluded, in practice they are highly unlikely to be eligible for clemency because the mean sentence for property offenses is 29

¹³ *Id.*

¹⁴ *Announcing New Clemency Initiative, Deputy Attorney General James M. Cole Details Broad New Criteria for Applicants*, DEP’T OF JUSTICE OFFICE OF PUB. AFFAIRS (Apr. 23, 2014), <http://www.justice.gov/opa/pr/announcing-new-clemency-initiative-deputy-attorney-general-james-m-cole-details-broad-new>.

¹⁵ *Id.* See also, Matt Apuzzo, *Justice Dept. Expands Eligibility for Clemency*, N.Y. TIMES (Apr. 24, 2014), <http://nyti.ms/1tC4Wd2>.

¹⁶ E. ANN CARSON, U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2013, 17 table 15 (2014), <http://www.bjs.gov/content/pub/pdf/p13.pdf>. (last visited on Aug. 6, 2015) [Hereinafter *BJS: Prisoners in 2013*].

¹⁷ *Id.*

¹⁸ *Id.*

months,¹⁹ far below the 10-year minimum time-served criteria of the clemency initiative. The third category of federal inmates, those convicted of public order offenses, include those who have committed immigration offenses and those who have committed weapons offenses.²⁰ Since the average sentence of those convicted of illegal entry into the United States is about two years,²¹ inmates in the immigration subset of public order offenses too appear unlikely to be eligible for the clemency initiative. Those convicted of weapons offenses, on the other hand, receive a mean sentence of 88 months,²² putting them in the general ambit of the clemency initiative. Finally, those convicted of drug offenses, the mean sentence for which is 87 months,²³ too appear to fall in the general ballpark of the clemency initiative's criteria.

II. THE SHORT TERM EFFICACY OF THE CLEMENCY INITIATIVE

The implicit focus of the clemency initiative on these two categories of offenses (namely, drug offenses and weapons offenses), has the potential to impact a significant number of inmates.²⁴ There

¹⁹ SEAN ROSENMERKEL, MATTHEW DUROSE, & DONALD FAROLE, JR., U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, FELONY SENTENCES IN STATE COURTS, 2006, 9 Table 1.6 (2009), <http://www.bjs.gov/content/pub/pdf/fssc06st.pdf>. (last visited on Aug. 6, 2015) [Hereinafter *Felony Sentences in State Courts*].

²⁰ *BJS: Prisoners in 2013*, *supra* note 16.

²¹ Michael T. Light, Mark Hugo Lopez & Ana Gonzalez-Barrera, *The Rise of Federal Immigration Crimes*, PEW RESEARCH CENTER (Mar. 18, 2014), <http://www.pewhispanic.org/2014/03/18/the-rise-of-federal-immigration-crimes/>. The authors note that

[d]ramatic growth over the past two decades in the number of offenders sentenced in federal courts has been driven primarily by enforcement of a particular immigration offense—unlawful reentry into the United States. . . . The increase in unlawful reentry convictions alone accounts for nearly half (48%) of the growth in the total number of offenders sentenced in federal courts [from 1992 to 2012].”

Id.

²² *Felony Sentences in State Courts*, *supra* note 19.

²³ *Id.*

²⁴ The focus on drug offenders is conceptually sound in so far as “the single largest driver in the increase in the federal prison population since 1998 has been longer sentences for drug offenders.” Ezra Klein & Evan Soltas, *Wonkbook: 11 Facts About America's Prison Population*, WASH. POST (Aug. 13, 2013),

are about 98,200 federal inmates convicted of drug offenses and 30,000 federal inmates convicted of weapons offenses.²⁵ These inmates account for about 66% of all federal inmates.²⁶ As such, the clemency initiative bears promise for addressing the problem of over-incarceration in federal prisons.

There are, however, three significant constraints that may prevent the clemency initiative from meeting its full potential prior to the end of President Obama's term in office: logistical limitations, overly restrictive criteria, and poor structural design.

First, the manner in which the clemency initiative is being administered raises significant logistical issues. After the clemency initiative was announced, the Bureau of Prisons circulated a questionnaire seeking to identify eligible inmates.²⁷ Over 30,000 inmates responded.²⁸ Screening these prospective applicants to identify those who meet the criteria for the clemency initiative, and then preparing clemency petitions for those who do appear to meet the criteria, will require the assistance of counsel.²⁹ In response to this

<http://www.washingtonpost.com/news/wonkblog/wp/2013/08/13/wonkbook-11-facts-about-americas-prison-population/>.

²⁵ See *BJS: Prisoners in 2013*, *supra* note 16.

²⁶ There were 103,775 inmates in federal custody in 2013. See *BJS: Prisoners in 2013*, *supra* note 16.

²⁷ *BOP Supports DOJ Clemency Initiative*, FED. BUREAU OF PRISONS (May 6, 2014, 5:30 PM),

http://www.bop.gov/resources/news/20140506_DOJ_clemency_initiative.jsp. The Notice that was circulated by the Bureau to inmates is available at

http://www.bop.gov/resources/news/pdfs/Notice_to_Inmates_Initiative_on_Executive_Clemency.pdf.

²⁸ Peter Baker, *Obama Plans Broader Use of Clemency to Free Nonviolent Drug Offenders*, N.Y. TIMES (July 3, 2015), <http://nyti.ms/1RX1lji>.

²⁹ This is because demonstrating that the inmate would likely have been sentenced to a lower prison term under the current sentencing guidelines—one of the criteria for the clemency initiative—likely will require a complicated analysis of federal sentencing law. Likewise, while the clemency criteria exclude inmates who have been convicted of violent crimes, it is not clear what crimes constitutes crimes of violence. Nor is it clear whether an inmate who has engaged in violent conduct during their incarceration, another seemingly disqualifying criteria, might be able to present mitigating factors. Even a seemingly straight-forward criteria such as having already served 10 years can be potentially complicated. For example, if the inmate served time in state prison for the same conduct, it is not clear how that would be factored into the analysis.

need for the assistance of a large number of attorneys, the American Bar Association and a group of non-profit organizations have collaborated to create Clemency Project 2014 (“CP2014”).³⁰ The goal of CP2014 is to screen these inmates and identify those who actually meet the criteria for relief. Then, working with trained pro bono attorneys, CP2014 will submit clemency petitions.³¹ While many law firms, lawyers, and law schools are participating in CP2014, there has been concern about insufficient numbers of pro bono lawyers available for this task and the slow pace of the review.³² Moreover, while the Federal Public and Community Defenders initially participated in the creation of CP2014, their participation has since been restricted.³³

Another logistical problem is the difficulty in collecting the information necessary to screen cases. Since each potential case is at least 10 years old (in keeping with the clemency initiative’s criteria), it is often difficult to get the case file from the inmate’s trial attorney.³⁴ Moreover

[M]any of the cases require an in-person trip to a courthouse because older documents are not on PACER. Even tougher to get are the presentence investigative reports, or PSRs, which are usually sealed.

³⁰ Op-Ed., Cynthia W. Roseberry, *Clemency Project Gears Up*, N.Y. TIMES (Sept. 1, 2014), <http://nyti.ms/1toZ1Kn>. The other organizations involved are the American Civil Liberties Union, Families Against Mandatory Minimums and the National Association of Criminal Defense Lawyers. *Id.*

³¹ See Lorelei Laird, *Clemency Project 2014 Is Out To Help Prisoners Doing Excessive Time Due To Inflexible Sentencing*, ABA JOURNAL (July 1, 2015), http://www.abajournal.com/magazine/article/clemency_project_2014_is_out_to_help_prisoners_doing_excessive_time.

³² See Gregory Korte, *Obama Administration Clemency Push Gets Slow Start*, USA TODAY (June 1, 2015), <http://www.usatoday.com/story/news/politics/2015/05/31/obama-clemency-initiative/27963853/>.

³³ See Alia Malek, *Federal Defenders Barred From Massive Clemency Drive*, AL-JAZEERA (Aug. 1, 2014), <http://alj.am/1u7XhT5>; see also Will Baude, *What Authority Do Judge Bates’s Letters Have?*, *The Volokh Conspiracy*, WASH. POST (Aug. 21, 2014), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/08/21/what-authority-do-judge-bates-letters-have/>.

³⁴ Laird, *supra* note 31.

. . . [A] handful of judges have denied requests to unseal them; and in one case, a prosecutor opposed it.³⁵

The bottleneck in the initial screening process has been compounded by the prospect of a lengthy review at the DOJ. The DOJ has requested that all clemency petitions be submitted by January 2016 to give the DOJ and the President adequate time to act on each request.³⁶ Given the large number of potential clemency applicants and the short amount of time, unless there is a ramp up in legal resources, it is likely that the clemency initiative may not reach its potential.³⁷

Second, the criteria for the clemency initiative have restricted its scope. For example, while 30,000 federal inmates have self-identified as being eligible for relief under the clemency initiative, this only represents less than a third of all federal inmates incarcerated for drug-related offenses and only about 15% of the total number of federal inmates. This might be because many inmates have been rendered ineligible by the requirement that inmates have finished serving 10 years in prison.³⁸

Third, the Obama Administration's decision to keep the clemency initiative under the auspices of the Pardon Attorney and the DOJ may well prove to be a critical problem in its effectiveness. As scholars have observed, not only does this structural framework seem unsuitable for the task of processing large numbers of clemency applications in the short time remaining until President Obama's term expires, but it also builds in the potential for conflict of interest and

³⁵ *Id.*

³⁶ Gregory Korte, 'The Clock Is Running' On Obama Clemency Initiative, USA TODAY (June 24, 2015) <http://www.usatoday.com/story/news/politics/2015/06/24/clemency-initiative-clock-is-running/29128091/>.

³⁷ Recent developments do not bode well. In early June 2015, the House of Representatives adopted the Marino Amendment, barring the Department of Justice from using funds for Clemency Project 2014 or for bolstering the capabilities of the Pardon Attorney's office. See Professor Mark Osler's Informed Perspective On Recent Federal Clemency Developments, SENTENCING LAW AND POLICY (June 4, 2015, 12:08 AM), http://sentencing.typepad.com/sentencing_law_and_policy/2015/06/professor-mark-oslers-informed-perspective-on-recent-federal-clemency-developments.html.

³⁸ See Laird, *supra* note 31.

cognitive bias on the part of the DOJ attorneys tasked with reviewing the clemency petitions.³⁹

Recent history justifies these concerns. As the Inspector General found, Ronald Rodgers, the former Pardon Attorney had deliberately misled President Bush with regard to Clarence Aaron's clemency application.⁴⁰ Rodgers, who had previously served as a military judge and major drug crimes prosecutor, was fired in April 2014.⁴¹ More recently, the public opposition to the clemency initiative by the National Association of Assistant U.S. Attorneys,⁴² raises concern since these attorneys may well be among those tasked at the DOJ to review clemency petitions.

One potential solution is to "recreate a pardon reviewing authority either outside of the Department of Justice, as part of the executive Office of the President, or as a direct function of the Attorney General as the President's personal representative."⁴³ In

³⁹ See Op-Ed., Rachel E. Barkow & Mark Osler, *The President's Idle Executive Power: Pardoning*, WASH. POST (Nov. 26, 2014), https://www.washingtonpost.com/opinions/the-presidents-idle-executive-power-pardoning/2014/11/26/3934ab1c-71aa-11e4-8808-afaa1e3a33ef_story.html ("What is broken is no mystery. The key gatekeepers for this process are in the Justice Department—the same agency that prosecutes federal crimes. Unsurprisingly, the department has been reluctant to second-guess its own decisions and rarely recommends that the White House approve a clemency petition."); see also, Alafair S. Burke, *Prosecutorial Agnosticism*, 8 OHIO ST. J. CRIM. L. 79, 97 (2010) ("A prosecutor's personal belief that the defendant is guilty can also continue to interfere with neutral decision making after the defendant has been convicted.").

⁴⁰ See Dafna Linzer, *Pardon Attorney Misrepresented Facts to White House in Clarence Aaron Case*, PBS.ORG (Dec. 18, 2012), <http://www.pbs.org/wgbh/pages/frontline/criminal-justice/report-pardon-attorney-misrepresented-facts-to-white-house-in-clarence-aaron-case/>. Aaron was one of the eight inmates whose sentence was commuted by President Obama in December 2013.

⁴¹ See Dafna Linzer, *Justice Finally Comes to the Pardons Office and Perhaps to Many Inmates*, MSNBC (Apr. 23, 2014), <http://on.msnbc.com/QyjNpK>.

⁴² See Steve Cook, *Drug Laws Keep Our Nation Safe: Opposing View*, USA TODAY (Jul. 16, 2015), <http://www.usatoday.com/story/opinion/2015/07/16/mandatory-minimum-sentencing-drug-trafficking-editorials-debates/30262641/>.

⁴³ See Paul Rosenzweig, *A Federalist Conception of the Pardon Power*, THE HERITAGE FOUNDATION (Dec. 4, 2012) available at <http://www.heritage.org/research/reports/2012/12/a-federalist-conception-of-the-pardon-power> (last visited on Aug. 6, 2015). Margaret Colgate Love has argued that the federal pardon process can be reinvigorated by focusing on three key issues:

addition, this new reviewing authority should be staffed with a broad variety of personnel including “prosecutors, sociologists, psychologists, historians, and even defense attorneys.”⁴⁴ Even if the Pardon Office is not moved out of the Department of Justice, the President can convene a special Pardon Board for administering the clemency initiative. This would be akin to the Presidential Clemency Board set up by President Ford to process the applications for clemency for offenses related to the draft.⁴⁵ Those Board members selected from outside the DOJ reviewed over 21,000 applications for clemency in just one year.⁴⁶

Absent amelioration of these resource constraints, restrictive criteria and structural design, there is a very real possibility that the clemency initiative may not meet its potential of impacting mass incarceration. Indeed, even with the 46 commutations by President Obama in July 2015, there have been less than 90 commutations in the fifteen months since the initiative was announced.⁴⁷

authority, accountability and transparency. See Margaret Colgate Love, *Reinvigorating the Federal Pardon Process: What the President Can Learn From the States*, 9 U. ST. THOMAS L.J. 730, 751 (2012). Doug Berman similarly has called for the President to form a “Clemency Commission” headed by a “Clemency Czar” to “improve the functioning, transparency, and public respect for executive clemency.” Douglas A. Berman, *Turning Hope-And-Change Talk Into Clemency Action For Nonviolent Drug Offenders*, 36 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 59, 72 (2010); See also Evan P. Schultz, *Does the Fox Control Pardons in the Henhouse*, 13 FED. SENT’G REP. 177 (2001) (arguing that the influence of prosecutors over the pardon process should be reduced and moved instead into the White House); Brian M. Hoffstadt, *Guarding the Integrity of the Clemency Power*, 13 FED. SENT’G REP. 180 (2001) (arguing that clemency cases should remain in the Justice Department, but that the process should be restructured so as to restore the Attorney General’s role).

⁴⁴ *Id.*

⁴⁵ See Mark Osler & Matthew Fass, *The Ford Approach and Real Fairness for Crack Convicts*, 23 FED. SENT’G REP. 228, 228 (2011).

⁴⁶ *Id.*

⁴⁷ David Jackson & Gregory Korte, *Obama’s Clemency Grant Largest Since the 1960s*, USA TODAY (Jul. 13, 2015), <http://www.usatoday.com/story/news/2015/07/13/obama-clemency-46-men-and-women-facebook/30086127/>.

III. THE LONG TERM EFFICACY OF THE CLEMENCY INITIATIVE

President Obama's clemency initiative has the potential to affect mass incarceration even after his term expires by serving as a model for future presidents. This long-term efficacy of the clemency initiative, however, is predicated on the acceptance of its legitimacy as an enterprise. Absent popular acceptance, the willingness of future administrations to use the pardon power in such a manner would be significantly diminished.⁴⁸

Since its inception, mirroring the reflexive and incessant, and yet quite calculated and deliberate, opposition to almost every administrative program,⁴⁹ critics have sought to delegitimize President Obama's clemency initiative. In particular, they have made three claims about the clemency initiative that have the potential for undermining its popular acceptance. As discussed below, none of these claims is compelling.

First, some critics have assailed the clemency initiative, which has the potential of affecting thousands of inmates, as being unprecedented. As a factual matter, however, this claim is unfounded. Clemency has been an integral part of the day-to-day operation of the federal justice system for much of our history.⁵⁰ From the early days

⁴⁸ As scholars have pointed out, the much maligned use of the pardon power by Presidents Clinton and George W. Bush at the end of their second terms, and the public uproar that ensued, has had a chilling effect on the practices of future administrations. See, e.g., Margaret Colgate Love, *The Twilight of the Pardon Power*, 100 J. CRIM. L. & CRIMINOLOGY 1169, 1212 (2010).

⁴⁹ James Wolcott, *The Conspiracy to Commit Legislative Constipation*, VANITY FAIR (Apr. 27, 2012), <http://www.vanityfair.com/culture/2012/03/The-Conspiracy-to-Commit-Legislative-Constipation> (noting that on the night of President Obama's inauguration, at a private dinner of leading Republicans, Kevin McCarthy, the House Republican Chief Deputy Whip, was quoted as saying that "'If you act like you're the minority, you're going to stay in the minority [W]e've gotta challenge them on every single bill and challenge them on every single campaign.'"). The following year, then Senate Minority Leader Mitch McConnell said that "[t]he single most important thing we want to achieve is for President Obama to be a one-term president." Jonathan Capehart, *Republicans Had It In For Obama Before Day 1*, WASH. POST. (Aug. 10, 2012), https://www.washingtonpost.com/blogs/post-partisan/post/republicans-had-it-in-for-obama-before-day-1/2012/08/10/0c96c7c8-e31f-11e1-ae7f-d2a13e249eb2_blog.html.

⁵⁰ See, e.g., *Herrera v. Collins*, 506 U.S. 390, 411–12 (1993) ("Clemency is deeply rooted in our Anglo-American tradition of law"). See also Margaret Colgate

of the Founding, “at a time when the laws were relatively harsh and inflexible, the presidential pardon power was virtually the only way that federal offenders could have their convictions reviewed, prison sentences reduced, and rights of citizenship restored.”⁵¹ Indeed, by the turn of the nineteenth century, over 40 percent of federal prisoners received clemency.⁵² And while it is true that the clemency initiative is a marked departure from the clemency practices of the past few presidents (beginning primarily with President Reagan’s second term⁵³), “until 1980, each president granted well over a hundred post-sentence pardons and sentence commutations almost every year, without fanfare or scandal.”⁵⁴

Second, some critics have attacked the clemency initiative for granting relief to an entire class of defendants rather than being individually tailored to correct injustices in particular cases.⁵⁵ As an initial matter, this claim appears to be a misreading of the criteria for relief. While having a non-violent drug conviction is a necessary prerequisite under the initiative, it is not a sufficient condition for relief. Rather, once the population of potential inmates with the qualifying conviction is identified, there must be individual-specific findings of

Love, *Of Pardons, Politics and Collar Buttons: Reflections on the President's Duty to be Merciful*, 27 FORDHAM URB. L.J. 1483 (2000).

⁵¹ Margaret Colgate Love, *Reinventing the President's Pardon Power*, 20 FED. SENT'G REP. 5, 6 (2007).

⁵² *Id.* at 6 n.12. (“In his classic 1941 study of federal pardoning practices, W.H. Humbert reported that between 1860 and 1900, 49 percent of all applications for presidential pardon were granted. In 1896 there averaged 64 acts of pardon for every 100 prisoners, and in the next five years the ratio between acts of clemency and the federal prison population was, on average, 43 percent.”) (citation omitted).

⁵³ Love, *supra* note 51, at 7.

⁵⁴ *Id.* See also Victoria J. Palacios, *Faith in Fantasy*, 49 VAND. L. REV. 311, 348–49 (1996) (“The presidential clemency power has atrophied in the last half century. President Johnson granted over seventy clemencies per year at the beginning of his term. When he was criticized for one in particular, the number was reduced to only five over the remaining eighteen months of his presidency. President Nixon granted thirty-six percent of all requests for clemency; President Ford awarded twenty-seven percent; and President Carter just over twenty-one percent. President Bush granted fewer clemencies during his tenure than most presidents in the past twenty-five years.”)

⁵⁵ Letter from House Judiciary Committee to Loretta Lynch, Att’y Gen., U.S. Dep’t of Justice (July 14, 2015), http://judiciary.house.gov/_cache/files/9364ee67-373d-48a4-9cae-a20932eb5145/071415-clemency-letter.pdf [Hereinafter *House Judiciary Committee Letter*].

good behavior and lack of violent history during the minimum 10 years of incarceration.⁵⁶

In any event, even if the clemency initiative were to be used to grant relief based on a group characteristic, it would be consistent with historical practice.⁵⁷ For example, intending “to send a message to Congress, Presidents Kennedy and Johnson commuted the sentences of more than 200 drug offenders serving mandatory minimum sentences under the Narcotics Control Act of 1956.”⁵⁸ President Carter too granted clemency for an entire class: “during his first full day in office, [he] pardoned those who had evaded the draft during the Vietnam War in an effort to ‘bind the wounds that an unpopular war had inflicted on society and on its young people, so that healing could begin.’”⁵⁹ This action bore striking resemblance to that of President Lincoln who, a little over a hundred years earlier, had granted clemency to dozens of deserters.⁶⁰ Indeed this practice of mass clemency has roots back to President Washington.⁶¹

⁵⁶ See *supra* Part I.

⁵⁷ See Charles Shanor & Marc Miller, *Pardon Us: Systematic Presidential Pardons*, 13 FED. SENT. REP. 139 (2001) (“At least a third of all United States presidents, including many of our greatest presidents, and from the earliest administrations, have used systematic pardons.”); *id.* at 140 (chronicling the use of the pardon power for public policy purposes from 1795 to 1977).

⁵⁸ Love, *supra* note 51, at 6.

⁵⁹ Jonathan T. Menitove, *The Problematic Presidential Pardon: A Proposal For Reforming Federal Clemency*, 3 HARV. L. & POL’Y REV. 447, 453 (2009) (citing KATHLEEN DEAN MOORE, *PARDONS: JUSTICE, MERCY, AND THE PUBLIC INTEREST* 81–82 (1989)).

⁶⁰ Rosenzweig, *supra* note 43. President Lincoln’s decision in 1862 to grant reprieve to 265 Dakota prisoners sentenced to death “constituted the largest mass clemency of people sentenced to death in American history.” Paul Finkelman, “*I Could Not Afford to Hang Men For Votes: Lincoln the Lawyer, Humanitarian Concerns, and the Dakota Pardons*,” 39 WM. MITCHELL L. REV. 405, 409 (2013).

⁶¹ Daniel T. Kobil, *The Quality of Mercy Strained: Wresting the Pardoning Power From the King*, 69 TEX. L. REV. 569, 592 (1991) (“In 1795, President Washington granted an unconditional pardon to many of the participants in the Pennsylvania Whiskey Rebellion.”). Moreover, “John Adams, in order to serve ‘the public good,’ likewise issued a presidential pardon to all persons involved in an insurrection in Pennsylvania.” *Id.* And, “[a]fter the Federalists were soundly defeated in the election of 1800, President Jefferson utilized the clemency power to pardon all those convicted and sentenced under the Alien and Sedition Act . . .” *Id.* at 592–93.

Third, some critics have claimed that the clemency initiative represents a “usurpation of the lawmaking authority of the Legislative branch.”⁶² Initially, it bears noting that this critique is ironic since many of these critics had previously been proponents of a robust understanding of presidential power and the unitary executive theory.⁶³

That aside, rather than an undermining of a legislative judgment, the clemency initiative is better understood as an effort by the Executive Branch to provide review and oversight of earlier Executive Branch decisions. Namely, the President’s exercise of his pardon powers through this clemency initiative is a necessary and appropriate action for ameliorating the harsh consequences that have stemmed in part from the charging, pleading, and sentencing practices of the prosecutors in the affected cases.⁶⁴

Over the past few decades, developments in the criminal justice system, particularly in plea bargaining and sentencing, combined with the virtually unrestricted discretion in policing and charging decisions, have resulted in a significant shift in power from the judicial and legislative branches of government to the executive.⁶⁵ Prosecutors in particular have come to wield enormous power,⁶⁶ the largely unrestricted exercise of which has been a key driver of much of

⁶² *House Judiciary Committee Letter*, *supra* note 55.

⁶³ See Christopher S. Yoo et al., *The Unitary Executive in the Modern Era, 1945-2004*, 90 IOWA L. REV. 601 (2005); Julian E. Zelizer, *The Conservative Embrace of Presidential Power*, 88 B.U. L. REV. 499 (2008).

⁶⁴ Rachel E. Barkow, *Clemency and Presidential Administration of Criminal Law*, 90 N.Y.U. L. REV. 802, 807 (2015) (Clemency can be “a key presidential oversight mechanism for keeping federal criminal law enforcement in check.”). See also *Herrera v. Collins*, 506 U.S. 390, 415 (1993) (“Executive clemency has provided the “fail safe” in our criminal justice system.”)

⁶⁵ Robert L. Misner, *Recasting Prosecutorial Discretion*, 86 J. CRIM. L. & CRIMINOLOGY 717, 718 (1996) (“In the past thirty years, the diffusion of responsibility has begun to abate and power has increasingly come to rest in the office of the prosecutor. Developments in the areas of charging, plea bargaining, and sentencing have made the prosecutor the preeminent actor in the system.”).

⁶⁶ *Id.* at 741–42. (“Although the discretion given to the legislature, to the police, and to prison officials is broad and immensely important, the prosecutor has become the most powerful office in the criminal justice system. The prosecutor’s authority is evident in bail hearings, grants of immunity, and in trial strategy. But in the areas of charging, bargaining, and sentencing, it has become clear that the prosecutor plays the pivotal role in the criminal justice process.”).

the mass incarceration of the past quarter century.⁶⁷ By seeking to adjust the punishment imposed on non-violent drug offenders who have already served significant prison sentences,⁶⁸ the clemency initiative is part of a broader Presidential enterprise using enforcement discretion as a policymaking tool.⁶⁹ Indeed, given the dysfunctional state of legislature, such Presidential action may be the only pragmatic course of action.⁷⁰

Thus, while the President's exercise of clemency sometimes are rightly seen as the granting of mercy,⁷¹ the clemency initiative is

⁶⁷ See, e.g., Ronald F. Wright, *Sentencing Climate Change and the Infrastructure of Finality*, 4 WAKE FOREST J.L. & POL'Y 1, 2–3 (2014) (“While multiple factors have contributed to mass incarceration, the charging and disposition choices of prosecutors in the state courts is probably the most important among those causes. Prosecutors charge a greater percentage of arrestees with crimes serious enough to result in a prison or jail term, and those prosecutor decisions drive up the incarceration rate.”) (citing John Pfaff, *The Myths and Realities of Correctional Severity: Evidence from the National Corrections Reporting Program*, 13 AM. L. & ECON. REV. 491 (2011)). See also Berman, *supra* note 43, at 59 (“A massive increase in incarceration levels in recent decades, fueled in large part by the so-called “war on drugs,” has made America the world’s leader in imprisonment by a wide margin.”)

⁶⁸ Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 1027 (2006) (“Without judicial oversight to speak of or any internal constraints, the potential for arbitrary enforcement is high. Prosecutors need not treat similar cases similarly for purposes of plea bargaining, and they need not explain why they agreed to reach a deal with one defendant but refused to do so with another defendant guilty of the same crime.”)

⁶⁹ Barkow, *supra* note 64.

⁷⁰ As one scholar has explained:

While all these instances of nonenforcement provoked controversy, structural forces may well explain why recent Presidents have so frequently resorted to nonenforcement rather than seeking a change in law. In an era of partisan polarization and legislative gridlock, Presidents often cannot count on Congress to develop legislative solutions to perceived problems, or even to negotiate over such solutions in good faith. Nevertheless, the public increasingly holds the President accountable for all failures of national policy. Reliance on all forms of executive authority, without resort to Congress, thus becomes a nearly irresistible temptation for modern Presidents.

Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671, 686–87 (2014).

⁷¹ As one scholar has noted, while the ability to grant clemency “is not among the most awesome powers of the American Chief Executive; it is, at best, his most

better seen as a means of ensuring a just outcome in specific cases.⁷² As Alexander Hamilton noted when defending presidential pardon powers, “[t]he criminal code of every country partakes so much of necessary severity, that without an easy access to exceptions in favor of unfortunate guilt, justice would wear a countenance too sanguinary and cruel.”⁷³

While none of these principal critiques seeking to undermine the legitimacy of the clemency initiative have merit, they do reflect an underlying angst about the seemingly unbridled use of power by the Executive branch. This legitimate concern is alleviated to some extent by the operation of three constraints. First, the President’s pardon powers are subject to some, albeit modest, constitutional limitations.⁷⁴ Second, insofar as Presidents are concerned about their reelection, the electoral prospects of future candidates of their political party, or even the future legacy of their Presidency, there is an organic political constraint on the President’s pardon powers.⁷⁵ Third, and perhaps most salient, is the President’s character. As the Chief Justice Marshall observed, “[b]y the constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable

benevolent power.” William F. Duker, *The President's Power to Pardon: A Constitutional History*, 18 WM. & MARY L. REV. 475 (1977).

⁷² Barkow, *supra* note 64. (“Clemency is thus a uniquely powerful weapon in the President’s toolkit for making sure that enforcement reflects his or her priorities and values, and ensuring that his or her agents do not contradict those views in a manner that overly restricts liberty. It is a flexible tool that can be used on an individualized basis or as a wholesale matter, to correct applications of law across a range of cases that share certain attributes. Clemency may also be granted on a conditional basis to correct particularly pernicious collateral consequences of convictions.”).

⁷³ Price, *supra* note 70, at 701; Rachel E. Barkow & Mark Osler, *Restructuring Clemency: The Cost of Ignoring Clemency and a Plan for Renewal*, 82 U. CHI. L. REV. 1, 17 (2015) (“With striking foresight, the Framers identified the specific problem that could be countermanded through the pardon power: the inevitable instinct of legislators, propelled by political impulse, to create harsh sentences against unpopular criminals that would prove disproportionate in particular cases.”).

⁷⁴ See Mark Strasser, *The Limits of the Clemency Power on Pardons, Retributivists, and the United States Constitution*, 41 BRANDEIS L.J. 85 (2002); Harold J. Krent, *Conditioning the President's Conditional Pardon Power*, 89 CAL. L. REV. 1665 (2001).

⁷⁵ See Jeffrey Crouch, *The President's Power To Commute: Is It Still Relevant?*, 9 U. ST. THOMAS L.J. 681 (2012); Laura Kalman, *Gerald Ford, the Nixon Pardon, and the Rise of the Right*, 58 CLEV. ST. L. REV. 349 (2010).

only to his country in his political character, and to his own conscience.”⁷⁶ As unsatisfying an answer as it may be in the hyper-partisan environment that defines our current politics, the principles, values and good judgment of the person holding the Office of the President serve as the best check against the abuse of the pardon power.⁷⁷

CONCLUSION

President Obama’s clemency initiative has the potential to affect the cases of several thousand federal inmates prior to the end of the President’s term. And as a model for future presidents, it has an even greater long term potential impact on the federal criminal justice system.

However, while the attacks on the legitimacy of the President’s actions are unfounded, the clemency initiative is hobbled by significant design and practical constraints. The poor execution of the clemency initiative may leave un-rectified, unwarranted outcomes from an overly harsh criminal justice system in which the prosecutorial choices in charging, plea bargaining, and sentencing have resulted in arguably unjust outcomes.

Despite bipartisan calls for clemency,⁷⁸ for example, Weldon Angelos, “a first-time offender convicted of selling \$350 worth of marijuana on three occasions, while also possessing firearms,”⁷⁹ remains imprisoned after having been sentenced to a term of 55 years. Judge Paul G. Cassell, who sentenced Angelos, observed that recidivists and persons convicted of serious crimes as aircraft hijacking, murder and rape would have received lesser sentences than

⁷⁶ *Marbury v. Madison*, 5 U.S. 137, 165 (1803) (Marshall, C.J.).

⁷⁷ See P.S. Ruckman Jr., *The Study of Mercy: What Political Scientists Know (And Don't Know) About the Pardon Power*, 9 U. ST. THOMAS L.J. 783 (2013); Bernadette Meyler, *Updating the Executive, Or, the Character Of The Pardoning President*, 45 TULSA L. REV. 605 (2010).

⁷⁸ See Sari Horwitz, *Unlikely Allies*, WASH. POST. (Aug. 15, 2015), <http://www.washingtonpost.com/sf/national/2015/08/15/clemency-the-issue-that-obama-and-the-koch-brothers-actually-agree-on/>.

⁷⁹ Andrea Jones, *The Nation's Shame: The Injustice of Mandatory Minimums*, ROLLING STONE (Oct. 7, 2014), <http://www.rollingstone.com/politics/news/the-nations-shame-the-injustice-of-mandatory-minimums-20141007>).

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Angelos, and called his punishment “unjust, cruel, and even irrational.”⁸⁰

⁸⁰ United States v. Angelos, 345 F.Supp.2d 1227, 1230 (D. Utah 2004).